

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 03 March 2006

BALCA Case No.: 2005-INA-00056
ETA Case No.: P2001-CA-09053119/ML

In the Matter of:

RUBITIME, INC.,
Employer,

on behalf of

JULIO CESAR GARCIA HERRERA,
Alien.

Appearance: Simin H. Syed, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone¹**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of permanent alien labor certification for the position of Stock Control Supervisor. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20,

¹ Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

Part 656 of the Code of Federal Regulations ("C.F.R."). ² We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 29, 2001, the Employer, Rubitime, Inc., LLC -- a company engaged in the import, export and wholesale of watches -- filed an application for labor certification to enable the Alien, Julio Cesar Garcia Herrera, to fill the position of Stock Control Supervisor. (AF 37). The job required two years of experience in the job offered and involved supervising and coordinating the activities of clerks engaged in keeping records of sales and inventory and taking periodical physical inventory and issuing production orders for stocks. The Employer requested that it be granted a Reduction in Recruitment. ("RIR"). (AF 136). The RIR was denied, and the matter was remanded for supervised recruitment. (AF 117).

On remand, the California Employment Development Department ("EDD") sent instructions for advertising the job to the Employer by letter dated April 18, 2003. (AF 105-107). The instructions stated that applicants must be contacted within 14 days of receipt of their resumes, and that delay in contact may result in a finding that recruitment was not in good faith. In addition, the instructions stated that the tear sheets from the newspaper advertisements must be sent postmarked within 45 days of the day of the EDD's letter.

An advertisement for the position was placed in the Los Angeles Daily News on April 27, 28 and 29, 2003. (AF 99-102). Tear sheets were mailed to the EDD on May 23, 2003. (AF 103).

² This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

On June 23, 2003, the Employer's attorney faxed a letter to the EDD. The letter states "Pursuant to our telephonic conversation on June 4, 2003, you informed us that there are two applicants who applied for the offered position and will be forwarding their resumes to our office. Please be advised that we have not yet received any resumes from your office [P]lease send us the resumes at your earliest, so the employer can conduct the interviews in a timely manner" (AF 90-95).

By letter dated July 10, 2003, the EDD sent the Employer its "Final Documentation Notice." (AF 88-89). The letter states that if resumes were included, applicants must be contacted within 14 days of the receipt of the EDD's letter, and that delay in contact may result in a finding that recruitment was not in good faith. The EDD letter attached the resumes of five applicants.

On July 14, 2003, the Employer faxed a letter to the EDD stating that one of the applicant's resumes did not include a phone number. (AF 83-87).

By letter dated August 19, 2003, the Employer filed its recruitment report with the EDD. (AF 71-72). In regard to three applicants, the Employer stated that it had attempted to contact them by phone, but because it was unsuccessful, it sent them certified letters asking that they contact the Employer. These applicants, however, never contacted the Employer and the Employer drew the conclusion that they were not interested. In regard to the applicant for whom the Employer had to request the phone number, the Employer reported that it contacted and interviewed her. The Employer, however, found her not to be qualified because her experience was either as an assistant warehouse manager or not relevant. In regard to the last applicant, the Employer stated that it contacted and interviewed him, but that he reported that he did not possess the requisite experience.

On September 23, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 33). The CO found that two applicants showed a combination of education,

training and/or experience which enabled them to perform the usual requirements of the occupation. In this regard, the CO noted that the OES Job Zone for this occupation is one to two years, "meaning that any U.S. applicant showing a one year background in the occupation will be considered basically qualified for the position" (AF 34). The CO directed the Employer to submit rebuttal showing with specificity why these two applicants were rejected for job-related reasons.

With regard to the three other applicants, the CO concluded that the Employer did not attempt to contact them until July 30, and then only by letter, which the CO concluded was an untimely and insufficient effort. The CO also faulted the Employer for not sending the tear sheets to the EDD until three weeks after the advertisements were run, stating that EDD relies on prompt receipt to know that the advertisements have in fact run and to then pull any resumes received from the suspense file. The CO indicated that rebuttal to this finding needed to include details of the attempts to interview the U.S. applicants.

Counsel for the Employer submitted rebuttal on November 25, 2003. (AF 14). Included with the rebuttal were a statement from the Employer's President (AF 23-24) and an affidavit from the Employer's Vice-President providing details about his interviews, or attempts to contact, the applicants. (AF 21-22). Also included were copies of documentation such as certified mail receipts, postage service delivery confirmation receipts, and phone records. (AF 39-70). The following is a summary of the statement, affidavit and documentation:

Applicant # 1.

Statement of the Employer's President: The Employer attempted contact of this applicant by telephone between July 11 and July 25, 2003, but was unsuccessful. Therefore a certified letter was sent. It is company policy only to make one to two attempts to contact applicants by telephone, but they sent the letter to establish good faith.

Affidavit of the Employer's Vice-President: He called this applicant on July 15, 2003. A person answered the phone who stated that this applicant no longer lived there and had left no forwarding address. Phone records were requested, but the phone company could not provide details for local calls. A later certified letter was returned as unclaimed.

Documentation: Certified mail receipts and postal service documents establish that the Employer sent a certified letter on July 30, 2003, that the postal service attempted delivery on July 31, August 9 and August 16, and that the letter was returned to the Employer as unclaimed. The Employer was provided the returned letter on August 21, 2003.

Applicant # 2.

Statement of the Employer's President: The Employer attempted contact of this applicant by telephone between July 11 and July 25, 2003, but was unsuccessful. Therefore a certified letter was sent. It is company policy only to make one to two attempts to contact applicants by telephone, but they sent the letter to establish good faith.

Affidavit of the Employer's Vice-President: He called this applicant on July 15, 2003, but was unable to reach him. The applicant did not respond to the certified letter. This was a long distance call, but the Employer has not been able to find the telephone bill; they have contacted the telephone company for a copy.

Documentation: The Employer sent a certified letter on July 30, 2003, and the postal service confirmed delivery on August 4, 2003.

Applicant # 3.

Statement of the Employer's President: This applicant was interviewed, but her experience was as an Assistant Warehouse Manager; the Employer is looking for an experienced Manager, and she is not qualified. The DOT Code has

an SVP for this occupation that permits the Employer to require a minimum of two years of experience, and it is the Employer's policy to so require.

Affidavit of the Employer's Vice-President: No telephone number was provided on this applicant's resume, so the Employer's attorney attempted to contact the DOL to obtain one. When two weeks passed with no response, the Employer sent a certified letter. This applicant contacted the Employer and she was interviewed.

Documentation: The Employer sent a certified letter on July 30, 2003, and the postal service confirmed delivery on August 1, 2003. A handwritten telephone number appears on her resume.

Applicant # 4.

Statement of the Employer's President: The Employer attempted contact of this applicant but was unsuccessful. Moreover, review of his resume indicates that he does not have the requisite experience in inventory control.

Affidavit of the Employer's Vice-President: He called this applicant on July 15, 2003, but was unable to reach him. He did not respond to the certified letter.

Documentation: A telephone bill shows that a telephone call lasting one minute or less was placed to this applicant on the morning of July 15, 2003. The Employer sent a certified letter on July 30, 2003, and the postal service confirmed delivery on August 1, 2003.

Applicant # 5.

Statement of the Employer's President: This applicant was interviewed by telephone on July 15, 2003. His experience was in shipping and warehouse supervision -- not stock control. He had no hands-on experience with the job duties, but rather his experience was with shipping and loading services.

Affidavit of the Employer's Vice-President: He called this applicant on July 15, 2003. The applicant was interviewed in person on July 16, 2003.

Documentation: A telephone bill shows that a telephone call lasting about 2.5 minutes was placed to this applicant on the morning of July 15, 2003.

In regard to the citation for failure to send the tear sheets in a timely manner, the Employer's rebuttal observed that the Employer sent the tear sheets 13 days prior to the deadline stated in the EDD letter.

A Final Determination was issued on March 29, 2004. (AF 12). The CO found that the Employer had failed to establish that the two applicants who were found to have a combination of education, training and experience indicating ability to perform the job were rejected for lawful, job-related reasons. The CO found that the Employer's rebuttal did not address this finding, the Employer's rebuttal having only indicated that the applicants were asked if they had experience in the job title, which was not a title recognized by the DOT. With regard to the late contact of the other three applicants, the CO found that the Employer's rebuttal indicated an even later contact time, as the postal service records showed deliveries between August 1st and August 21st. The CO also found that the Employer's rebuttal did not address the delay in sending tear sheets to the Job Service and also failed to provide evidence to substantiate the Employer's claim that it called all five applicants on July 15th as alleged. The CO found the Employer's evidence to be insufficient to establish a good faith recruitment effort and denied labor certification.

On April 28, 2004, Employer filed a "Request for Reconsideration for the Denial of Labor Certification." ("Request") (AF 2). In addition to re-voicing the arguments made in rebuttal, the Employer pointed out that the position at issue is specifically recognized in the DOT at definition number 222.137-038. It is unclear whether the CO ruled on the motion for reconsideration. There is a handwritten note on the motion that appears to state: "Marc Denied 3/29/4." This matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer did not file an appellate brief.

DISCUSSION

A CO is required to state clearly whether he has denied the employer's request for reconsideration or has granted the request, and upon, reconsideration, affirmed his denial of certification. *Richard Clarke Associates*, 1990-INA-80 (May 13, 1992) (*en banc*). In the instant case, the handwritten note on the Employer's motion for reconsideration might constitute a denial of the motion, but it is hardly clear that such was the purpose of the note. In any case, in the interest of administrative efficiency, we will assume that the CO denied the motion to reconsider, and proceed to review the matter on the merits.

The Final Determination presented three grounds for denying labor certification: (1) that the Employer had failed to rebut the CO's conclusion that two applicants appeared to possess a combination of education, training and experience such that they should be considered qualified for the position; (2) that several applicants were not contacted in a timely manner, and (3) that the Employer failed to address its delay of three weeks in sending the tear sheets to the EDD.

The CO made several unwarranted assumptions about this case. For example, in the Final Determination he found that the Employer's job was not covered by a definition found in the Dictionary of Occupational Titles. Clearly, it is covered by DOT No. 222.137-038. The CO also made a finding in the Final Determination indicating that he believed that contact of one applicant had been made as late as August 21, 2003. This was the date, however, that the postal service returned the unclaimed letter sent to the applicant who did not leave a forwarding address. Similarly, in the NOF the CO found that the OES Job Zone indicated that the Employer was only entitled to require one year of experience in the job offered. Clearly, the Specific Vocational Preparation for the DOT job title, however, permitted the Employer to require two years of experience. Accordingly, we decline to affirm the CO's finding that two of the

applicants exhibited such a combination of education, training and experience that they should be found to have the ability to perform the job duties for the position offered.

Nonetheless, we affirm the CO's finding that several applicants were not timely contacted.

When an employer files an application for labor certification, it is signifying that it has a bona fide job opportunity which is open to U.S. workers. Inherent in this presumption is the notion that the employer legitimately wishes to fill the position with a U.S. applicant and will expend good faith efforts to do so. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (en banc). Thus, employers applying for labor certification are under the affirmative duty to commence review and make all reasonable attempts to contact applicants as soon as possible: *M.N. Auto Electric Corp.*, *supra*; *Creative Cabinet & Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (en banc); *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991) (en banc). The Board in *Creative Cabinet* explained: "A delay is likely to result in workers becoming disinterested in the opportunity. A delay without cause is also an indication of an employer's lack of a good faith effort to evaluate U.S. applicants. It is irrelevant that the record . . . does not show that the delay actually caused or contributed to an apparently qualified applicant's disinterest or unavailability. An employer's intent in creating an unjustified delay is equally irrelevant."

The advertisements in the instant case were run on April 27, 28 and 29, 2003. The CO cited the Employer's slowness in providing tear sheets to the EDD as contributing to the delay in contacting applicants. We agree that this slowness was a contributing factor. The Employer, however, has a reasonable excuse for this delay based on the 45 day deadline it was given by the EDD. Moreover, the delay from late May to July 10 for the EDD to transmit the resumes was clearly not the fault of the Employer. Nevertheless, the record shows that the Employer did not make good faith efforts to timely contact all of the potentially qualified applicants once it did receive the resumes.

The faxes sent by the Employer's attorney to the CO asking for the phone number of one of the applicants establishes that the Employer received the resumes no later than July 14, 2003. Despite the lack of some phone records, we conclude that it is likely that the Employer attempted to contact those applicants for whom it had a telephone number on or about July 15, 2003. The Employer's self-professed policy, however, was to make only one or two attempts to phone applicants. Given that over a month and a half had already passed since the advertisements had run, it was not good faith recruitment for the Employer to wait two weeks after the telephone attempts before mailing letters to the applicants it could not reach by telephone. Mailing the letters at that late date meant that over two months had passed since the advertisements had been run. The Employer's attorney clearly knew that the time for contacting applicants was running out given his June 23, 2003 fax to the EDD requesting that the resumes be sent as soon as possible.

Thus, although the attempted telephone calls appear to have been made the day after receipt of the resumes, there is no evidence to support a finding that more than one attempt was made to phone applicants. Moreover, the certified mail receipts establish that the Employer waited two weeks before mailing letters to the four applicants it could not reach by telephone. It is not particularly surprising, therefore, that two of the applicants whose receipt of the contact letter was confirmed by the postal service did not respond to the Employer. This disinterest may be attributed to the Employer's lack of urgency in following up telephone calls with letters.

Based on the foregoing, we find that the Employer failed to establish that it made good faith efforts to contact potentially qualified applicants as soon as possible, or that it had a reasonable excuse or justification for that lack of timeliness.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.